IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-557

CONSOLIDATION COAL COMPANY, Petitioner
v.
UNITED STATES OF AMERICA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF ON BEHALF OF PETITIONER

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ARGUMENT

he Government has conceded that the decision of the United States Court of Appeals for the Sixth Circuit[1] in this case is in error as to the Government's right to an administrative search warrant and is in conflict with other appellate decisions. However, it takes the position that certiorari should nonetheless be denied by this Court for the following reasons: (1) the decision is interlocutory; (2) the search warrant affidavits in question satisfied the *Aguilar-Spinelli*[2] test; and (3) alternatively, a warrantless search was proper under the holdings in the *Biswell*[3] and *Colonnade*[4] cases.

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1. Hereinafter, reference to the Sixth Circuit shall be to the majority opinion of Circuit Judges Celebrezze and Cecil in this case.

2. *Aguilar v. Texas,* 378 U.S. 108 (1964); *Spinelli v. United States,* 393 U.S. 410 (1969).

3. *United States v. Biswell,* 406 U.S. 311 (1972).

4. *Colonnade Catering Corp. v. United States,* 397 U.S. 72 (1970).

It is respectfully submitted that the alternative positions taken by the Government are not supportable. Moreover, rather than negating the request for a writ of certiorari, they actually enforce the need for a review by this Court.

1. *Interlocutory Nature of Decision*: Petitioner respectfully disagrees with the contention that this case is not appropriate for review by this Court and that the reversal and remand by the Sixth Circuit places petitioners in the same position as if the district court had denied their motions to suppress.

To begin with, the appellate process in this case was initiated by the Government pursuant to the provisions of 18 U.S.C. § 3731, which gives the Government the right to appeal a decision of a district court suppressing evidence where that "evidence is a substantial proof of a fact material in the proceeding." This statutory provision is an express recognition of the desirability of appellate review where district courts have, as here, granted motions to suppress and would indicate that decisions of this nature are not to be treated as interlocutory for purposes of appellate review.[5] Having been initiated by the Government, the appellate process should and can continue to a final resolution by this Court. This is especially true where, as here, the Court of Appeals' decision is based, not on a factual issue peculiar to the individual case, but upon novel and significant constitutional issues involving searches and seizures.

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5. *Cogen v. United States*, 278 U.S. 221 (1929), cited by the Government on page 5 of its brief, is inapplicable to this situation since it predated enactment of 18 U.S.C. § 3731, and involved an appeal by the defendant from a denial by a district court of a suppression motion.

The Government suggests that the issues in this case would be mooted if all petitioners were acquitted on remand. Although such a result would be favorable to petitioners in this particular case, it would not resolve the conflicts in decisions discussed in the Petition filed herein and would leave standing as a controlling principle of law a holding by the Sixth Circuit which the Government itself concedes is incorrect.

The Government has alternatively suggested that this Court would have an opportunity to review the issues presented herein if petitioners are convicted and the convictions are affirmed on appeal. Even if that situation occurs, it still leaves standing for an indefinite time a concededly incorrect decision which also is in conflict with other appellate decisions.

It is clear that this Court has the authority to grant and has developed a policy of granting certiorari to review the judgment of a court of appeals reversing and remanding an action to the district court for further proceedings in situations where (1) the court of appeals' decision is in conflict with other appellate decisions; (2) the issue decided is of general and significant importance—in contrast to an issue which is a matter of private interest to the litigants only; and (3) the issue presented is fundamental to the further conduct of the case. *Larson v. Domestic & Foreign Commerce Corporation*, 337 U.S. 682 (1949); *Land v. Dollar*, 330 U.S. 731 (1947); *United States v. General Motors Corp.*, 323 U.S. 373 (1945); *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403 (1916); and *Forsyth v. Hammond*, 166 U.S. 506 (1897).

It is respectfully submitted that this case satisfies each of the foregoing criteria and that certiorari should be granted. *Brotherhood of Locomotive Firemen & Engineers v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327 (1967) did not involve a suppression motion and did not establish any policy concerning interlocutory appeals. It stands only for the proposition that in the circumstances of that case, it was not yet ripe for review.

2. *The Aguilar-Spinelli Test.* In support of its argument that the *Aguilar-Spinelli* test was satisfied, the Government has represented (pp. 6-7) to this Court that the unnamed informant had "witnessed the commission of illegal activities . . ." and that all of his information was based upon "personal knowledge". Petitioner disagrees with this representation and further submits that it is precisely the lack of specificity as to how the unnamed informant obtained his information concerning the activities of employees at the Georgetown laboratory which is fatal in testing the sufficiency of the affidavits. It is obvious that the informant did not personally witness any illegal activities and that he had no "personal knowledge" of claimed criminal conduct at the Georgetown laboratory. By contrast, his own activities at Franklin No. 25 Mine were completely neutral.

Furthermore, the failure to indicate in the affidavits how the *unnamed* informant came by his information as to the illegal activities also serves to distinguish this case from the circuit court cases cited by the Government on page 6 of its brief. Each of those cases involved a *named* informant whose information was obtained through personal observation or knowledge because he

was either an eyewitness to or victim of a crime. Such is clearly not the case here.[6]

Nor is the present case analogous to *United States v. Harris,*[7] also cited by the Government on page 6 of its brief. *Harris* involved "personal and recent observations" of criminal activity by the informant, who had also made a declaration against his penal interest. *Harris* did not involve a situation, such as was present in *Spinelli* and in this case, where "the affidavit failed to explain how the informant came by his information." *Harris,* supra at 579.

3. *Warrantless Search.* In addition to rejecting the Sixth Circuit's holding that administrative search warrants were appropriate here, the Gomernment has also rejected the Sixth Circuit's holding that the intrusion by the deputy marshals here could not be justified as a warrantless search. (Government's brief, pp. 9-13.) It should be noted that the Sixth Circuit rejected "out of hand" the warrantless search contention, concluding that "only inspections of the *underground* portions or

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6. The Government is also incorrect in its assertion that the "two named technicians" stated "that it was a company practice to submit fictitious dust samples to federal inspectors in *all* the company's mines in the Central Ohio District." (Emphasis added.) (Respondent's brief, pp. 8-9.) The Holgate affidavit quotes the informant as stating that the two technicians told him "that similar practices were employed at *other* mines in the Central Division" (A. 55a) (emphasis added.) without specifying what practices or which mines were being referred to. There is clearly no indication that *all* the mines in the Central Division were involved. Several mines were not searched in the May 22 raid. There is no way of determining which mines were being described in the affidavit.

7. *United States v. Harris,* 403 U.S. 573 (1971).

'active workings' of coal mines may be performed without search warrants under Section 813(a) and (b)." Additionally, the Sixth Circuit pointed out that nothing in the Act authorizes the wholesale seizure of records which took place here. (A. 5a-6a).

In the Federal Coal Mine Health and Safety Act, as in the legislation controlling liquor dealers in *Colonnade* and in the Gun Control Act in *Biswell,* Congress selected a standard that did not expressly provide for *forcible* entry and seizure in the absence of a warrant. Instead the Government was given a civil remedy of obtaining an injunction whenever an operator refuses to permit inspection of the mine or to furnish requested documents and records.[8] Additionally, civil penalties may be imposed upon those operators refusing entry or access to records.[9] Compare *Colonnade* and *Biswell* where criminal penalties could be imposed for refusal of entry, but as here, forcible entry was not provided for.

Like the liquor dealer in *Colonnade* and the gun seller in *Biswell,* the mine operator may permit the entry and inspection or be subject to coercion and punishment by injunction and civil fines for refusal. The inspectors may not, however, force entry.[10] The Government's brief (page 11) fails to recognize that the *Colonnade* decision turned upon Congress' failure to provide federal inspectors with a right of *forcible* entry without

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8. 30 U.S.C. § 818.

9. 30 U.S.C. § 819(a).

10. The *Biswell* defendant, unlike the defendant in *Colonnade,* expressly consented to the entry rather than face criminal prosecution for refusal. By contrast, the forcible entry in *Colonnade,* made despite the defendant's refusal to consent, was struck down.

a warrant rather than, as the Government claims, that Congress had not provided for warrantless entries at all.

Here, the search was accompanied by unauthorized force, to wit, the use of an invalid warrant. No consent to this forcible entry was given since submission to an invalid warrant does not constitute consent. *Bumper v. North Carolina,* 391 U.S. 543 (1968).

Additionally, as the Sixth Circuit correctly pointed out, the Act does not provide any authority, express or otherwise, for warrantless searches of Consol's private mine offices wherein it had and expected, privacy, citing *Youghiogheny and Ohio Coal Company v. Morton,* 364 F. Supp. 45 (S.D. Ohio 1973). Moreover, the Sixth Circuit recognized that the Act provides no right of forcible seizure of any property belonging to the operator.

In any event, a search for criminal evidence is not the equivalent of an administrative inspection. As the United States Court of Appeals for the Ninth Circuit observed in *United States v. Thriftimart, Inc.,* 429 F.2d 1006, 1008 (9th Cir. 1970), cert. denied, 400 U.S. 926 (1970), "the Supreme Court has long recognized that [searches for evidence of a crime] are not the legal equivalent of administrative inspections . . .". Continuing, the Court commented:

> "Further, as stated in Camara, the administrative search is 'neither personal in nature nor aimed at the discovery of evidence of crime' and thus involves 'a relatively limited invasion of the urban citizen's privacy.' " Id. at 1009.

In its claimed right of warrantless search, the Government has chosen to ignore the forcible entry which took place here, the fact that the Act provides no right

of seizure of private documents and the fact that this search was pursuant to a criminal investigation rather than merely part of an administrative inspection.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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